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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PHELPS CEMENT PRODUCTS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

May employees be deprived of their statutory right to an election under Section 7 of the National Labor Relations Act, as amended. In the absence of an election, may the National Labor Relations Board order an employer to bargain with a union without clear and convincing evidence that the employer voluntarily recognized the union and thereby waived its right to insist upon an election under Section 9 of the National Labor Relations Act as required by the Court's holding in *Linden Lumber*.

May the Board order an employer to recognize and bargain with a union absent proof of majority status and outrageous and pervasive unfair labor practices.

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Petitioner, Phelps Cement Products, Inc., prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit, enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court of appeals is unreported and appears in Appendix A. The findings of fact, conclusions of law, and order of the National Labor Relations Board are reported at 257 N.L.R.B. No. 4 (1981) and appear in Appendix B. The decision and order of the administrative law judge are reproduced in Appendix C.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was entered on April 1, 1982. Petitioner's petition for rehearing and rehearing en banc was denied on May 19, 1982. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), and §10(f) of the National Labor Relations Act, as amended.

APPLICABLE STATUTORY PROVISIONS

The pertinent provisions of the National Labor Relations Act, as amended (herein, the "Act"), are Sections 1, 7, 8(a)(5) and 9. They are set forth in Appendix "D".

STATEMENT OF THE CASE

Petitioner, Phelps Cement Products, Inc. (herein, the "Company"), is a New York corporation engaged in the manufacture of cement, concrete blocks, and the retail sale of hardware and masonry supplies. The Company consists of one facility, a plant located in Phelps, New York. At the time of the dispute, the plant had approximately twenty-five total employees.

The Company is a closely-held corporation. Philip Haers, Jr., its president and member of the board of directors, is responsible for the Company's daily operations. Philip Haers, Jr., has served in that capacity since 1976, when his father, Philemon Haers, Sr., retired from day-to-day control. Although retaining the title of chairman of the board, Philemon Haers, Sr., continues to serve solely in an advisory capacity. (C.3)

This dispute has as its genesis a meeting which took place on November 28, 1979 at the Company's business office adjacent to the Company's plant. The meeting was initially attended by Philemon Haers, Sr., and James Walters, Business Representative for Bricklayers, Masons, and Plasterers Local No. 43 of the Finger Lakes Region (herein, the "Union"). Messrs. Haers and Wal-

ters were later joined by Philip Haers, Jr. The seminal factual dispute is whether, during the course of the meeting, the Company, through the Haers, agreed to waive its and its employees' statutory rights to an election conducted by the Board.

Walters arrived at the Company, unannounced and alone, at approximately two o'clock p.m. Walters had in his possession union authorization cards purportedly signed by ten of the Company's employees. (C.3)

Walters asked to see Phil Haers and was led into the office of Philemon Haers, Sr. After some introductory remarks, Walters produced the authorization cards for examination. (C.4)

Within the hour, Philip Haers, Jr., appeared and inquired as to the nature of Walters' business. Walters informed him that he was a representative of the Union and that he was requesting that the Company commence negotiations.

During the next hour, the employment status of employees on Walters' cards was discussed with the Company's payroll clerk. The parties were unable to agree as to the names and job titles of the employees who would comprise an appropriate unit. The Company believed the unit should have included twenty employees while the Union argued that only fifteen or sixteen would have been eligible to vote.

It is significant to note that although Walters purportedly had ten cards, the testimony revealed that one card was submitted by an employee who was no longer employed by the Company while a second card was signed by an individual never employed by the Company. (C.5)

The Haers inquired as to the possible alternatives to voluntary recognition and Walters explained that if the Company declined to recognize the union voluntarily, he would pursue filing a petition with the Board, eventually leading to an election. Additionally, Philip Haers, Jr., asked Walters to describe the scenario if negotiations

took place and Walters described a procedure of circulating proposals for a contract among employees, and then, conducting discussions with management. Finally, the parties discussed employee benefits currently offered by the Company. (C.5) At the trial, Walters testified that the Haers stated a desire for an election but thereafter vacilated between wanting an election and expressing a willingness "to get it over with".

Toward the conclusion of the conversation, Philip Haers, Jr., advised Walters that neither he nor his father could make the decision. Rather, a meeting of the Company's board of directors would be required to determine whether or not a Board-conducted election was preferable to voluntary recognition. The meeting concluded at approximately 4:40 p.m. (C.6)

Immediately following the meeting with Walters, a special meeting of the Company's board of directors was convened. Phil Haers, Jr., informed the group that he had been advised by Walters that a majority of employees had requested the Union to represent them as their collective bargaining agent. Phil Haers, Jr., also informed the board of directors of the alternative available for a Board-sponsored election at which time all eligible employees would cast a vote and thereby make their own decision.

After deliberation, the meeting ended with Phil Haers, Jr., being instructed to call Walters the following day and tell him that the Company wanted an election. (C.6)

On the following morning, Phil Haers, Jr., telephoned Walters and informed him that the Company desired an election. (C.6) The Union declined to file a petition for an election. Instead, on December 4, 1979, the Union filed a charge with the Board alleging, *inter alia*, that the Company agreed to recognize the Union and thereafter, unlawfully withdrew its recognition. The Union sought, thereby, to eliminate an employee vote

and, instead, requested a bargaining order be imposed. On January 11, 1980, the Board issued a complaint alleging, *inter alia*, that the Employer unlawfully withdrew recognition of the Union in violation of Sections 8(a) (1) and (5) of the Act.

The Board's Conclusions of Law and Order

A hearing was held before Richard L. Dennison, Adminstrative Law Judge (herein, the "ALJ"), on June 18, 19, and 20, 1980, in Rochester, New York. The ALJ issued his decision on April 9, 1981, in favor of the Union. Thereafter, exceptions were filed by the Company. On July 21, 1981, the Board issued its decision and order affirming, in its entirety, the decision of the ALJ. (B.1,2)

The ALJ found that recognition had been accorded by the Company at the November 28 meeting. The ALJ concluded that the Haers and Walters agreed to voluntarily recognize the Union based on Walters' testimony that the Haers agreed to recognize the Union and thereafter wanted an election and then changed and changed back again. After testifying that the Haers never really committed themselves, Walters, in summary fashion, stated, "I don't remember the exact words, but an agreement was reached to bargain." The ALJ discredited the Haers' testimony as not comprehensive. The ALJ, without support from, or a reference to the transcript, stated in conclusory fashion that the Haers omitted detailed references to portions of the conference. Moreover, the ALJ, without substantial explanation, or reference to any corroborative evidence, accepted Walters' vague conclusion and found that the Company had voluntarily recognized the Union. (C.6)

Not only did the ALJ make this finding of recognition notwithstanding the vagueness of Walters' recollection and a lack of corroborating testimony, but, when Walters testified that he telephoned his attorney immediately after his meeting with the Haers, the ALJ denied

counsel for the Company's request to examine Walters on the only potentially independent corrobative evidence under the aegis of the attorney-client privilige. The ALJ also made clear his refusal to allow the Union's attorney to be subjected to examination.

Why did the ALJ refuse to allow the Company's attorney the opportunity of examining the witness about the Union's only alleged corrobative post-meeting conduct? Indeed, the transcript of the trial was replete with the ALJ's refusal to allow the Company's attorney the opportunity of exploring into the commission or omission of other patterns and practices by the Union under similar circumstances. In a case to be decided on the basis of conflicting oral testimony, why did the ALJ so severely limit the scope of cross examination?[1]

The ALJ also found that the special meeting of the Company's board of directors occurred, that Phil Haers, Jr., had left that meeting with instructions to request an election, and that Phil Haers, Jr., in fact called the next day to report the Company's decision to Walters. (C.7) These findings, which appear to support the Company's position, were neither discredited, dismissed, or reconciled with the ALJ's conclusion that voluntary recognition occurred and therefore, there would have been no reason for the meeting to have taken place.

Further, despite objections by the Company and no testimony or other evidence in support thereof, the ALJ determined the unit composition of sixteen employees to be appropriate. (C.6) The ALJ's determination effectively ordered the Company to recognize and bargain with the Union without proof of majority status.

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1. For example, the ALJ refused to permit testimony establishing Walters' past pattern and practices when seeking recognition. Furthermore, the ALJ refused any testimony as to why Walters failed to advise employees that recognition had been voluntarily granted and that the employees did not have any knowledge of recognition until much later.

Finally, the ALJ ordered the Company to restore recognition and bargain with the Union upon request. (C.8,9)

The Decision of the Court of Appeals

The Second Circuit Court of Appeals, acting on the Company's petition for review and the Board's cross-petition for enforcement, affirmed the ALJ's order by a 3-0 vote.

In its summary opinion, the court would not disturb the credibility findings of the ALJ. With respect to the lack of corroborative evidence of voluntary recognition and Walters' vague recollection, the Court stated that, "It is not unusual for a person to forget the specific words spoken to him six months earlier." (A.2)

With respect to the Board's refusal to distinguish the case from those involving a repudiation of recognition, the court held that this was a policy matter for the Board and not the court, citing the opinion of the First Circuit Court of Appeals in *N.L.R.B. v. Brown & Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979). (A.3)

The Court declined to address the issue of majority status, the appropriate unit, the ALJ's refusal to allow reasonable cross examination, the lack of corroborative evidence, and this Court's opinion favoring elections to protect employees' Section 7 rights when questions concerning representation are raised.

REASONS FOR GRANTING THE WRIT

The National Labor Relations Board must not deprive employees of their statutory right to select the bargaining representative of their choice, absent clear and convincing evidence that an employer voluntarily recognized a union thereby waiving its right to insist upon an election under Section 9 of the National Labor Relations Act as required by the Court's holding in *Linden Lumber*.

In this case, the Company respectfully requests the Court to clarify the burden of proof required to establish a voluntary grant of recognition to collective bargaining agents. Articulation of a standard of proof will correct inequities in the Board's current policy and promote protection of employee rights under Section 7. Moreover, it is respectfully submitted that there is a foundation for such articulation in prior cases of the Court as well as the Board.

Under current policy, the Board's position is that, absent other violations of the Act, an employer has a right to require an election regardless of a union's demonstration of majority status. *Linden Lumber Division v. N.L.R.B.*, 419 U.S. 301 (1974). On the other hand, once an employer expressly recognizes a union, no matter how informally, the Board's position is that the right to an election is lost. *N.L.R.B. v. Brown & Connolly, Inc., supra; N.L.R.B. v. Gogin*, 575 F.2d 596 (7th Cir. 1978); *N.L.R.B. v. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976). The Company believes that in the case of informal recognition, the Board's policy implies a mere preponderance of the evidence, a standard of proof that is contrary to, or in conflict with other Board cases and which has caused an inequitable, and, in this case, wrong result.

This case is appropriate for examination of this issue since it involves a unique factual situation, never before addressed by the Board or the courts. Here, the Board has ordered bargaining after the Union claimed recognition was granted without any corroborating evidence or testimony. More specifically, there is no bargaining history subsequent to the circumstances where the Company allegedly granted voluntary recognition to the Union. This element is conspicuously present in those holdings relied upon by the Board and the circuit court to conclude that recognition has been granted. It should be noted, also, that there are no other unfair labor practice charges against the Company.

The Board relied upon two cases to support its decision that the Company should be ordered to bargain with the Union. Those cases, *Lyon & Ryan Ford, Inc.*, 246 N.L.R.B. 1 (1978), *enf'd*, 647 F.2d 745 (7th Cir. 1981), and *Jerr-Dan Corp.*, 237 N.L.R.B. 302 (1979), are factually dissimilar to the case presently before this Court.

Lyon & Ryan Ford, Inc. involved an employer who had admittedly recognized a union as the collective bargaining agent for his employees and thereafter engaged in a course of egregious unfair labor practices culminating in the withdrawal of recognition. The parties engaged in extensive bargaining prior to the employer's withdrawal of recognition, having met at least three times to discuss various contract proposals before the employer announced that he wished to have an election. Those facts are not present in this case.

Similarly, *Jerr-Dan Corp.* involved an employer who withdrew recognition after he had acknowledged that the union had in its possession authorization cards from a majority of employees and then agreed to meet four days later. 237 N.L.R.B., at 303 (Citing *Brown & Connolly, Inc.*, 237 N.L.R.B. 271 (1978)).

In *Jerr-Dan Corp.* and *Brown & Connolly*, the Board concluded that the employer had *expressly* stated that it recognized the union.[2] Therefore, the Board had no reason to articulate a standard of proof required to make a conclusion of voluntary recognition. Here, however, no finding was ever made by the ALJ or the Board that the Company expressly recognized the Union.

Jerr-Dan Corp. and *Brown & Connolly* are best characterized as "reneging cases" where evidence of bargaining, or a commitment thereto, was found subsequent to express recognition. Thus, the Board had a firm

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2. Moreover, the facts in *Jerr-Dan Corp.* clearly showed that the employer waived his right to an election which he has a right to when confronted with a bargaining demand if he has committed no other unfair labor practices pursuant to *Linden Lumber Division v. N.L.R.B.*, 419 U.S. 301 (1974). *Jerr-Dan*, 237 N.L.R.B. at 303, n.7.

basis for concluding that recognition was granted even in the mind of the employers.

This case, on the other hand, concerns the question of whether or not voluntary recognition was ever afforded the Union. It does not involve a case where an employer withdrew recognition. The Board's policy fails in its application to this case by not permitting the ALJ or the circuit court to analyze the dominant issue of the case.

While *Jerr-Dan* was appealed to, and enforced by the Third Circuit in an unpublished decision, 601 F.2d 575 (1979), the First Circuit, in the *Brown & Connolly* enforcement proceeding, 593 F.2d 1373 (1st Cir. 1979), analyzed the inequitable predicament of the employer and suggested that the Board's policy be revised along the same lines proposed by the Company here.

In *Brown & Connolly*, eleven of the employer's seventeen employees, along with two union organizers, called upon the employer's president unannounced and recited a scripted dialogue forcing an admission from the president that he "recognized" the union. Based on substantial and credited testimony, the Board found its magic words of express recognition. On appeal, the circuit court commented that, ". . . even on General Counsel's case, the whole meeting might remind chess players of the fool's mate." 593 F.2d, at 1374. The court concluded that:

> The facts in this case might suggest the desirability of a rule that *recognition must be clearly and convincingly evidenced and not dependent upon* a staged performance and *resolution of disputed, possibly pergered testimony* which may have fostered here, at least in part, the very strife the Act is intended to prevent. [Emphasis supplied.] *id.*

Unlike this case, however, the employer in *Brown & Connolly* went on to commit several other unfair labor

practices subsequent to its refusal to bargain. Thus, the First Circuit would not disturb the Board's policy. *id.*

Interpreting the Company's actions as a repudiation, the Board, in this case, has been forced to utilize the vague recollection of Busines Agent Walters as the only evidence of recognition voluntarily accorded. Clearly, this case represents the obvious inequity in the Board's lack of articulation of an appropriate evidentiary standard.

The circuit court's upholding of the Board's conclusion was without support ("It is not unusual for a person to forget what was said six months earlier."), and, improper under the Board's policy since there was no finding of express recognition by the Employer.

The Company does not propose that the Court remove the opportunity for employers to voluntarily recognize a union upon demonstration of majority status which may be adjunct to the Act's policy promoting labor relations stability. *N.L.R.B. v. Broadmoor Lumber*, 578 F.2d 238 (9th Cir. 1978). The Company, also, does not suggest that the Court inhibit the ability to ascertain majority status by informal mechanisms such as a binding card count or poll. Instead, the Company proposes that the Court correct the inequity of the Board's policy by requiring clear and convincing evidence in the case of a voluntary grant of recognition which carries an implicit waiver of employee rights to an election under Section 7 of the Act. This standard of proof will promote protection of employee rights, one of the central policies of the Act.

The circuit court refused to disturb the evidentiary finding of the ALJ, quoting from its earlier decision in *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 490 (1952), that "it may not upset the Board when [it] accepts a finding of an Examiner which is grounded upon . . . the Examiner's evaluation or oral testimony as reliable, unless on its face it is hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documen-

tary testimony." With this requirement, the Company assumes a heavy and, perhaps, wrongfully-placed burden of proof that a waiver of its and its employees' statutory rights has occurred.

The primacy of the fundamental purposes of the Act is trumpeted by Section 1 which declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection."

Since a statutory right to an election is involved, the Board must be required to find clear and convincing evidence of a waiver of that right, and not the Company. With this burden of proof, the policy protecting employee rights under the Act is preserved.

Indeed, the Board itself has recognized that statutory rights, in particular Section 7 rights, are to be treated specially. Chairman Fanning, concurring in *Goya Foods, Inc.*, 238 N.L.R.B. 1465, 1467, (1978), stated succinctly that:

> Where Section 7 or statutory rights have been involved, the Board has insisted that waivers will not be readily inferred, and that there must be a clear and unmistakable showing that the waiver occurred.

The Employer asks, can Mr. Walters' testimony be read as a clear and unmistakable showing that a waiver of a Board election had occurred? Mr. Walters' testimony cannot provide the basis for a finding that a clear and unmistakable showing of an agreement to voluntarily recognize and bargain with the Union was in fact reached.

If the evidence presented in this case is held to be a sufficient basis for finding a clear and unmistakable waiver of a Board election, it will require little imagination for union representatives to conjure up facts sufficient to create bargaining obligations on the part of unsuspecting employers.

The practical effect of such a decision would do more than place the burden, rejected by the Supreme Court as discussed below, upon the employer to petition for an election. An employer, to avoid any possibility of misunderstanding or fabrication, would have no alternative but to refuse to meet with any union official who attempts to present evidence of majority status or who otherwise desires to discuss any issue concerning representation. Clearly, such a scenario violates the Board's own policy favoring voluntary cooperation with a union not only for representation, but for collective bargaining purposes as well.

Moreover, it is respectfully submitted that adoption of a clear and convincing standard has foundation in prior decisions of this Court.

In *Linden Lumber Division*, 190 N.L.R.B. 718 (1971), the Board recognized the inherent unreliability of authorization cards as a means for determining a collective bargaining representative. In that case, the Board retreated from its previous doctrine enunciated in *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732 (D.C. Cir. 1950), which had required a good-faith doubt to exist before an employer could refuse to recognize a union on the basis of authorization cards alone. In *Linden Lumber Division*, the Board found that employers "should not be guilty of a violation of Section 8(a)(5) solely upon the basis of [their] refusal to accept evidence of a majority status other than the results of a Board election." *Linden Lumber Division, supra*, at 721. The Board held that no longer would representation rights be determined by good or bad faith doubts.

The Supreme Court reversed the decision of the Court of Appeals for the District of Columbia, which had held that an employer who refused to recognize a union claiming a card majority had the burden of petitioning the Board for an election. Instead, the Supreme Court adopted the Board's position that the burden of clarifying questions concerning employees' selection of a bargain-

ing agent was properly placed on the union. The Court restated its position first articulated in *Gissel Packing Co. v. N.L.R.B.*, 395 U.S. 575 (1969), that, "[T]he election process has acknowledged superiority in ascertaining whether a union has majority support . . ." *Linden Lumber Division v. N.L.R.B.*, 419 U.S. 301, at 304 (1974). Thus, a preference for objective considerations to govern choice of bargaining agents has been acknowledged.

The case at bar presents a paradigm of why the electoral process is favored. An unfair labor practice proceeding, leading to a bargaining order was prosecuted based upon, at best, a scintilla of evidence consisting of a bare statement by a union business agent that the Company had agreed to recognize the union.[3] The Company contended that no such agreement was entered into. As a result, nearly three years have elapsed without a determination as to whether or not the Union actually represented a majority of the employees. Had the Union petitioned for an election after Walters' meeting with the Haers, the matter would have been resolved without reliance on authorization cards which had become stale and most likely inaccurate.

The Supreme Court anticipated precisely this situation in *Linden*. Justice Douglas, in the majority opinion, stated:

> The union which is faced with an unwilling employer has two alternative remedies under the

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3. Although the Company's objection to the ALJ's refusal to permit testimony of the telephone call to the Union's attorney was dealt with, under the aegis of the attorney-client privilege, the court in *N.L.R.B. v. Gogin*, 575 F.2d, at 605, accepted the Board's resolution of a telephone conversation in this regard. Thus, the ALJ's denial of the Company's request may have been proper. However, a disputed telephone call seems inappropriate to resolve the important question of recognition. Therefore, the Company does not, and has not, requested a remand to adduce additional evidence and believes that articulation of a standard of proof subsumes this issue.

> Board's decision in the instant cases. It can file for an election; or it can press unfair labor practices against the employer under *Gissel*. The latter alternative promises to consume much time. In *Linden* the time between filing the charge and the Board's ruling was about four and one-half years; in *Wilder*, about six and one-half years. The Board's experience indicates that the median time in a contested case is 388 days. On the other hand, the median time between the filing of the petition for an election and the decision of the Regional Director is about 45 days. In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored. *Linden, supra*, at 306-307. (Other citations omitted.)

The unambiguous teaching of *Linden* is that in situations similar to this case, our national labor policies favor filing a petition for an election over a subjective determination of recognition. A petition will resolve, by prompt and peaceful means, the question of whether the union enjoys majority status and, thus, secure an honest mandate for recognition.

The policy invoked by the Board in this case has substantially interfered with the ability of employees to exercise their free choice. The Court, in *Linden Lumber*, expressed its view that the use of unfair labor practice proceedings tend to inhibit, rather than enhance the growth of industrial peace. It was the goal of industrial peace that compelled the Board to retreat from its *Joy Silk Mills* doctrine when adopting the view advanced in *Linden Lumber*. The Board's decision in this matter, if permitted to stand, would mark a return to a highly pernicious version of the *Joy Silk Mills* doctrine.

Unreversed, this decision would allow vague and uncorroborated testimony to create the sole basis of a bargaining obligation. The Board's policy, if upheld, will

effectively set a precedent which will result in the re-establishment of Section 8(a) (5) proceedings as the preferred means for achieving recognition. Such a precedent would seriously undermine the electoral process and destroy statutory rights accorded under the Act. On the other hand, adoption of a clear and convincing standard of proof will preserve employees' Section 7 rights and promote the objective determination of employees' choice of bargaining agent as achieved by election procedures, without removing, in appropriate situations, the furtherance of industrial peace through informal and voluntary recognition.

The second question presented is whether the Board may issue a bargaining order without proof of majority status. This issue arises because there was a factual dispute as to the names and job classifications of persons that enjoy the community of interest necessary to be considered part of an appropriate unit of the Company's employees.

It was the Company's contention that on November 28, 1979, twenty of the Company's employees shared a community of interest which required the inclusion of all of them in an appropriate unit, whereas the Union believed that only fifteen or sixteen employees should be unit members. The actual number of employees that constituted an appropriate unit is important because, if the Union did not at the time of demanding recognition possess valid and authentic authorization cards signed by a majority of the employees that comprise an appropriate unit, the Company as a matter of law could not agree to voluntarily recognize the Union as the representative for collective bargaining purposes of its employees. *International Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737-738 (1961).

The ALJ concluded the appropriate composition of the Union without any analysis of the arguments presented by the Company or the Union. In fact, the ALJ concluded in a footnote that the parties agreed to the ap-

propriate composition of the unit without reference to any position of the transcript. (C.6) Moreover, there was no testimony in the transcript demonstrating that the parties agreed as to unit composition. How can the Company be ordered to bargain with the Union when it is unclear whether the Union has acquired authorization from at least a majority of the employees? Assuming, *arguendo*, that the Company did not voluntarily agree to recognize the Union, recognition under these circumstances would have been clearly unlawful. Therefore, the Board's bargaining order has no basis with respect to recognition nor with respect to the majority status of the Union.

The Company respectfully submits that the Board may not issue a bargaining order in an informal recognition case when a question concerning unit composition is concluded by the ALJ on vague testimony. The Company respectfully requests that the Court issue a writ of certiorari based on this question as well.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari shoud be granted.

Respectfully submitted,

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